IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID WILBUR POWELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21076

On Appeal from
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.
JURISDICTIONAL STATEMENT OF FACTS

This action was commenced by the return and filing of an Indictment by the Federal Grand Jury of the District of Arizona sitting at Tucson, Arizona, on November 16, 1965, charging David Wilbur Powell, the Appellant herein, with a violation of 21 U.S.C., §174, in that he did import and bring into the United States of America from the United States of Mexico, at Nogales, Arizona, contrary to law, approximately one and six-tenths (1.6) grams of heroin, a narcotic drug, on or about

the 13th day of October, 1965. (The transcript of the record will be referred to as "RC," the reporter's transcript of the testimony will be referred to as "RT," the number following "RT" will be the page of the transcript, and the number following "L" will be the line.) (RC, Item 1.)

On November 22, 1965, the Appellant was arraigned and was appointed counsel (RC, Item 12).

On December 7, 1965, Appellant filed a Motion to Reduce Bail (RC, Item 2). On December 8, 1965, the Government filed a Memorandum in Opposition (RC, Item 3). On December 13, 1965, a hearing was held and the Motion was denied. (RC, Item 12.)

On December 16, 1965, Appellant filed a Motion to Disclose Identity of Informer (RC, Item 4). On December 17, 1965, a Memorandum in Opposition was filed by the Government (RC, Item 5). On December 20, 1965, a hearing was held and the Motion was denied (RC, Item 12).

On December 29, 1965, trial was held and a verdict of guilty was returned by the Jury (RC, Items 6 and 12).

On January 3, 1966, the Court entered a judgment of conviction and sentenced Appellant to five years' imprisonment (RC, Item 7).

On January 12, 1966, Appellant filed a Notice of Appeal and Motion to Proceed in Forma Pauperis (RC, Items 8 and 9).

On April 22, 1966, the Court entered an Order Denying Certificate for Probable Cause for Appeal (RC, Item 10).

On June 24, 1966, the Circuit Court of Appeals for the

Ninth Circuit entered an Order Permitting Appellant to Appeal in Forma Pauperis.

This is an appeal pursuant to 28 U.S.C., §1291.

II.
STATEMENT OF FACTS

On October 13, 1965, at approximately 4:00 p.m., Henry Washington, a Customs Port Investigator, received information or tip and as a result of that information went into Nogales, Sonora, Mexico, and saw Appellant and Robert Jackson driving south as he, Washington, was going North (RT 96, L 4-10). Washington turned in about six or seven blocks and drove to the home of Ninni Abreu where he saw the blue Simca with California license plates parked with Robert Jackson in the car and Appellant standing in the yard of Abreu's house (RT 96, L 10-20; RT 98, L 5). The Appellant stood there about five or ten minutes and a man known to Washington came out of the house and Appellant and the man entered the Simca and drove off (RT 96, L 20-25). The man with Appellant was known to Washington as El Negro, but whose real name, Washington believes, is Tony Vallegas (RT 97, L 25, to RT 98, L 1).

Washington placed a lookout at the Nogales Port of Entry (RT 101, L 5-6).

At about 8:15 p.m. on October 13, 1965, William Searcy was at the Grand Avenue Port of Entry at Nogales, Arizona, when Appellant entered the United States from Mexico in a blue Simca automobile as a passenger with Robert Jackson driving (RT 10, L 7—RT 11, L 24). The Simca was directed to the area for secondary examination and the occupants were

asked for declarations by Searcy, and they both had nothing to declare (RT 11, L 22 to RT 12, L 4). Searcy phoned Washington, left Appellant and Jackson with Customs Inspector Rankin and searched the Simca (RT 12, L 5-10). Washington arrived, and Searcy and Washington searched Jackson in the search room and then called Appellant into the search room (RT 12, L 10-12 and RT 31, L 17-20). Washington asked Appellant to remove his personal belongings and Appellant reached for a cigarette package which Washington took from him (RT 12, L 13-14 and RT 30, L 16-20).

Washington looked into the package of Pall Mall cigarettes and saw a small, folded piece of white paper containing a powderish brown substance (RT 12, L 14-15 and RT 30, L 21-24). Searcy was sent for a Marquis Reagent field test and tested the contents, and the results were positive (RT 12, L 16-17; RT 30, L 24 to RT 31, L 1). Appellant was placed under arrest (RT 12, L 17-18 and RT 31, L 1-2). Washington ripped open the cigarette package and found three more papers inside, and Washington then arrested Jackson (RT 31, L 7-11).

Appellant and Jackson both testied they entered Nogales, Sonora, Mexico, on October 13, 1965, about noon (RT 59, L 16-20, and RT 79, L 1-4). Appellant and Jackson met a man on the street selling jewelry who was going to show them where to buy marihuana (RT 64, L 11-14; RT 80, L 2-3; RT 82, L 18). Appellant gave the man a pack of Pall Mall cigarettes and money, but when the man tried to run away from them, Appellant took the money and the cigarettes back (RT 65, L 19 to RT 66, L 3, and RT 80, L 12 to RT 84, L 21).

Appellant and Jackson both testified they then returned to the United States and went to several places trying to cash Jackson's Travelers' checks (RT 67, L 6-15 and RT 85 to RT

86). About six or six-thirty p.m. they returned to Nogales, Sonora, Mexico, went to Canal Street and then returned to the United States at about 8:00 p.m. (RT 68 to 69 and RT 86, L 10-25).

Appellant and Jackson both denied being in Nogales, Sonora, Mexico, after 4:00 p.m. at anyone's home (RT 74 to 75, and RT 91).

The Government offered as impeachment the testimony of Henry Washington, who described his trip into Mexico after 4:00 p.m. the afternoon of October 13, 1965 (RT 95 to RT 101—see opening of the Statement of Facts) and brought out Jackson's two felony convictions (RT 73, L 8-9).

III.
OPPOSITION TO SPECIFICATIONS OF ERROR

1. The Trial Court did not commit reversible error in admitting Government's Exhibits 1 and 1-A, and in denying Appellant's Motion for Judgment of Acquittal, there being a sufficient foundation for these exhibits.

2. The Trial Court did not commit reversible error in admitting Government's Exhibits 1 and 1-A, and in denying Appellant's Motion for Judgment of Acquittal in that the contents were shown to be "heroin," or by its chemical name, "heroin hydrochloride, a derivative of opium."

3. The Trial Court did not commit reversible error in denying Appellant's Motion to Disclose Identity of Informer.

IV.
SUMMARY OF ARGUMENT

1. There was a sufficient foundation laid for the admission of Government's Exhibits 1 and 1-A into evidence.

2. There was sufficient, and uncontroverted, evidence that the contents of Government's Exhibit 1-A contained a narcotic drug.

3. There was no showing of materiality to Appellant's guilt or innocence for the disclosure of the informant, and, further, where the informant is admittedly an observer, and not a participant, the privilege of non-disclosure should be sustained.

V.
ARGUMENT

1. There was a sufficient foundation laid for the admission of Government's Exhibits 1 and 1-A into evidence.

Henry Washington testified he kept the Pall Mall cigarette package and its contents in his possession, after Searcy had put his initials and date on the papers, until he placed the package in the locked strong box of the Customs Agency office to which he had the only key (RT 32, L 2 to RT 33, L 11). The next morning October 14, 1965, he removed it, examined it—it appeared to be the same—and turned it over to Karl Vogt, the Custodian of Seized Merchandise (RT 32, L 25 to RT 33, L 16).

Karl Vogt, the Custodian of Seized Merchandise, weighed the contents of the papers in the cigarette package, Exhibit 1-A,

placed the Pall Mall cigarette package, the cigarettes, and the papers and their contents into Government's Exhibit 1-A, which is an envelope with lock seals, and mailed it by registered mail to the U. S. Customs Laboratory in Los Angeles, California (RT 40, L 19 to RT 41, L 17). On November 29, 1965, he received Government's Exhibit 1-A by registered mail from the chemist (RT 41, L 18-21). Vogt placed Exhibit 1-A in the vault until he withdrew it the morning of trial (RT 41, L 22-25). When he mailed Government's Exhibit 1-A, it was sealed with self-locking devices, and when he received it back it was sealed with masking tape and the red seal (RT 42, L 11-14). The vault into which Vogt placed it has a combination and a key (RT 45, L 15), and Vogt has the only key (RT 45, L 17). The Acting Custodian of Seized Merchandise, Inspector Baker, has the combination (RT 45, L 19 and RT 46, L 22 to RT 47, L 1). Vogt, during the period from November 29, 1965, to the date of trial, December 29, 1965, did not turn the key over to Baker, but Vogt would leave the key overnight sometimes in another safe (RT 47, L 8-10). But when Vogt removed Government's Exhibit 1-A the morning of trial, it appeared to be in the same condition and had not been tampered with (RT 47, L 13-17).

Denzil Curtis testified that he is a United States Customs chemist (RT 48, L 18), and that he received Government's Exhibit 1-A by registered mail in a sealed condition, and it appeared not to have been tampered with (RT 49, L 22 to RT 50, L 7). Curtis received Government's Exhibit 1 on October 15, 1965, and placed it in a vault and removed it on October 26, 1965, when he examined it (RT 54, L 1-4). Curtis opened Government's Exhibit 1 and removed Government's Exhibit 1-A and slit it open where the masking tape now is (RT 50, L 23-25). He tested and weighed the contents and replaced them in Government's Exhibit 1-A and placed the masking tape and the red seal with a stamp-on

inscription reading "L.A., U.S. Customs Laboratory," (RT 50, L 13-20). Curtis completed the examination without leaving it and replaced the contents into the Pall Mall cigarette package and placed that into Government's Exhibit 1-A and placed Government's Exhibit 1-A into Government's Exhibit 1 and mailed it by registered mail to the Nogales Customs office (RT 55, L 7-15).

The record shows that Government's Exhibit 1-A was opened at the trial, in the presence of Appellant's counsel (RT 12, L 21 to RT 13, L 1).

In *Gallego v. United States,* (9th Cir., 1960), 276 F.2d 914, at page 917, this Circuit, quoting from *United States v. Penick and Co.,* (2nd Cir., 1943), 136 F.2d 413, at page 415, held that in establishing the chain of custody, the Government must show that the evidence is substantially in the same condition, and further, that there are no hard and fast rules that the Government must exclude all possibilities that the evidence was tampered with. This Circuit went on in the *Gallego* case to hold that there must be a clear abuse of discretion in admitting the evidence.

In *Brewer v. United States,* (8th Cir., 1965), 353 F.2d 260, page 263, the Court quoted from *Gallego:*

> " 'In the absence of any evidence to the contrary, the trial judge is entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their duties.' 276 F.2d 914, 917."

It is respectfully submitted there was a chain of custody

shown by the Government, and, that the contents of Government's Exhibit 1-A was shown to be in substantially the same condition at each link in the chain.

2. There was sufficient, and uncontroverted, evidence that the contents of Government's Exhibit 1-A contained a narcotic drug.

On direct examination, Denzil Curtis was asked and answered as follows:

"Q. (by Miss Diamos) All right. And did I ask you what the content of Exhibit 1-A was, the four papers?

"A. I did not state. In my opinion each of the four bindles contained, the powder in them contained heroin hydrochloride, which is a derivative of opium." (RT 52, L 21-25.)

Under 26 U.S.C., §4731(a)(2), "Any compound, manufacture, salt, derivative or preparation of opium, isonipecaine, coca leaves, or opiate;" is a narcotic drug.

Curtis performed ten or eleven tests, including the Marquis Reagent (RT 52, L 2-5). Not all these tests are necessary, but he does them to orient the powder for special purposes (RT 52, L 16-20). The Marquis test was performed by Searcy and was positive (see Statement of Facts).

He did not examine the powder quantitatively because it weighed only one and six-tenths (1.6) grams, or twenty-four (24) grains, and the laboratory has a rule of thumb not to test a substance which weighs less than fifty (50) grains (RT 53, L 10-13).

To argue now that heroin hydrochloride, the chemist's

technical name for heroin, is not heroin, is to strain common sense.

It is respectfully submitted that there was uncontroverted and sufficient evidence for the jury to find that the contents of Government's Exhibit 1-A was heroin, or, to use the technical name—heroin hydrochloride, and, as the Court instructed, was a narcotic drug (RT 132, L 16-17).

3. There was no showing of materiality to Appellant's guilt or innocence for the disclosure of the informant, and, further, where the informant is admittedly an observer, and not a participant, the privilege of non-disclosure should be sustained.

In *Alexander v. United States,* (9th Cir., 1966), 362 F.2d 379, this Court stated at page 383:

> "[7] Equally without merit is appellant's further argument that failure to identify or produce the informer at the trial constituted a denial of due process. The informant was admittedly neither a participant in, nor a witness to, the crime charged in the indictment, and of which appellant stands convicted. [See: Hammond v. United States, supra, 356 F.2d 931; Cook v. United States, 354 F.2d 529 (9th Cir., 1965); Hurst v. United States, 344 F.2d 327 (9th Cir., 1965; Jones v. United States, supra, 326 F.2d 124.]"

In the Government's Memorandum in Opposition to the Appellant's Motion for the disclosure of the identity of the informant, and on the hearing the Government *avowed* that the informant was not a participant, but merely an observer (RC, Item 5). There has been no showing to the contrary.

Appellant denied being in Nogales, Sonora, Mexico, between four and six-thirty p.m. (RT 91), as did his witness,

Robert Jackson (RT 74 to RT 75). The Government's witness placed them at the home of a known narcotics dealer, Ninni Abreu, and in the company of a man known to Washington as El Nigro (RT 96 to RT 98), and not anyone else (RT 100, L 13-16). Appellant testified he was in the company of two men (RT 83, L 7-13).

This evidence was the result of a border search. There was no necessity to demonstrate sufficient, reliable information for probable cause and therefore Appellant was not necessarily entitled to knowledge of the identity of the informer. *King v. United States,* (9th Cir., 1965), 348 F.2d 814, at page 819. Nor did he establish the materiality of the identity of the informer, that is, he denied the alleged transaction could have occurred after 4:00 p.m.; he stated he was with two men besides Jackson. None of these things concur with what Washington observed after 4:00 p.m.

It is respectfully submitted there was no necessity to disclose the identity of the informer.

VI.
CONCLUSION

The chain of custody of Government's Exhibit 1-A was sufficient to admit it into evidence, and its contents were proved to be heroin, a narcotic drug, and the disclosure of the identity of the informer was not necessary to the defense.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of the within Brief of Appellee mailed this ....21st.... day of November, 1966, to:

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